

Chief Judge Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 HENRY ROSENAU,)
)
 Defendant.)

NO. CR06-157MJP

EMERGENCY REQUEST FOR
RULING REGARDING
PROCEDURE AT DEPOSITIONS

NOTED: March 9, 2012

COMES NOW the United States of America, by and through Jenny A. Durkan, United States Attorney for the Western District of Washington, and Susan M. Roe and Marc A. Perez, Assistant United States Attorneys for said District, and files this Request for a Ruling on Procedures to be followed at Depositions, if such are allowed, in the above-entitled case. The government asks for an emergency consideration because Canadian Crown Counsel requires the identity of deposition participants.

I. CORRECTION OF ORDER OF PROCESS

The government first wishes to correct a misstatement made in its Reply, Dkt #77. At page 3, lines 6-8, the government wrote, “ Once a Sending Order is issued, . . . , the government will move promptly to . . . take the necessary steps for the depositions.” Canadian Crown Counsel has contacted the undersigned to arrange the depositions in Canada and Crown Counsel explained that the depositions are taken prior to the Sending Hearing, under the authoring of the Gathering Order. The depositions are part of the

1 evidence gathered so must be conducted before the Sending Hearing may be held. Then,
2 the depositions will considered for inclusion in the Sending Order.

3 ***II. CURRENT ARRANGEMENTS***

4 Secondly, the government wishes to notify the Court on the progress of scheduling
5 the depositions. Defense counsel Platt previously filed Notices of Unavailability from
6 February 27 through March 9, April 27, and June 18 through June 29. Dkts # 72, 76. In
7 an email of March 3rd, regarding scheduling the depositions, defense counsel wrote that
8 he also is unavailable during the last week of March and April 2-4, but available April 5
9 through April 10.

10 The Canadian Courts have a four day holiday from April 6 through April 9, 2012.
11 Therefore, Crown Counsel is setting the first deposition for Thursday, April 5, 2012, and
12 the second for Tuesday, April 10, 2012.

13 ***III. REQUEST FOR GUIDANCE ON APPROPRIATE PARTIES***

14 Crown Counsel requires the name of each person expected to participate in the
15 deposition. In response to the Canadian request for attendees, the government asks the
16 Court's guidance. Federal Rule of Criminal Procedure 15, allowing depositions in
17 criminal cases, addresses the Manner of Taking in section (e). Subsection (e)(3)
18 discusses the defendant and "the defendant's attorney," and (e)(2) holds that the scope
19 and manner must "be the same as would be allowed during trial." Thus, it appears that
20 the attorneys participating in the depositions are those who appear in the criminal case,
21 *United States v. Rosenau*.

22 The government asks for clarification because defense counsel has not answered
23 the question of whether he will attend in person or be with his client at the FDC during
24 the deposition. Rather than answering, he advised the government that Gary Botting
25 continues to represent the defendant in Canadian matters. (*See* Attachment 1).

26 The question before the Court is whether Mr. Botting may represent the defendant
27 at and during the depositions, which are testimonial proceedings in the American criminal
28

1 matter. It is important that the parties clearly understand the role of Mr. Botting and of
 2 defense counsel, to insure no later claim of misrepresentation or ineffectiveness.

3 ***IV. RULES***

4 General Rule 2, of the Local Rules for the Western District of Washington, sets
 5 out the eligibility for admission to the Federal Bar of this District. The rule allows “Any
 6 attorney who is a member in good standing of the Washington State Bar and any attorney
 7 who is a member in good standing of the bar of any state and who is employed by the
 8 United States . . . is eligible for admission to the bar of this court. GR 2(b).

9 The procedure for admission requires each applicant to petition the court,
 10 including her/his legal education, the list of other courts in which s/he is admitted to
 11 practice, his/her familiarity with Federal Rules and Local Rules and the petition must be
 12 endorsed by two “reputable persons who are either members of the bar of this court or
 13 known to the court . . .” GR 2(c)(1). The applicants must take an oath to “support and
 14 defend the Constitution and the law of the United States of America . . .” GR (c)(3). The
 15 Rule addresses the Standards of Professional Conduct expected from each member of the
 16 bar and, at some length, sets out the jurisdiction, procedures and actions the Court has for
 17 disciplining members of its Bar. GR 2(e)(f).

18 Members of Foreign Bar Associations, such as members of any of the Canadian
 19 Provincial Associations, who are not concurrently members of a State bar, are not subject
 20 to this Court’s jurisdiction, have no duty to this Court or its orders, and are not eligible for
 21 admission to practice before this Court. The Court appears to have no valid authority
 22 over members of foreign bar associations.

23 ***V. ARGUMENT***

24 Since a foreign lawyer in another country, even if a member in good standing of
 25 his/her home bar, is not eligible for admission to a federal bar and is the functional
 26 equivalent of a foreign citizen over which this Court has no apparent authority, the
 27 government believes Mr. Botting may not represent the defendant at or during the
 28 depositions. He should not participate, ask questions, lodge objections, or in any other

1 regard act as counsel in the matter. It may be that a locally-admitted lawyer will become
 2 co-counsel and could act on the defendant's behalf. Of course, Mr. Botting remains free
 3 to apply to the Canadian Courts to represent the defendant regarding the Sending Order or
 4 similar Canadian issues.¹

5 Therefore, the government asks the Court for an Order on the procedures to be
 6 followed during the depositions, including the identity of counsel allowed to participate.
 7 Crown Counsel requests the names of all attendees be known to them promptly.

8 DATED this 6th day of March, 2012.

9 Respectfully submitted,

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23
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 27
 28 ¹ There is nothing pending before the Courts regarding Rosenau's extradition. It
 was completed and closed when he was extradited.

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney of record for the defendant.

s/ Kathleen M. McElroy
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